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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-721

EDWARD EMERY,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE, INDIO DIVISION,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Edward Emery, petitioner herein, prays that a writ of certiorari issue to review the decision of the Court of Appeal of the

State of California, Fourth Appellate District entered in the above entitled case on August 31, 1977.

OPINIONS BELOW

The Court of Appeal of the State of California, Fourth Appellate District, Division Two, rendered no opinion when said court denied petitioner Edward Emery's Petition for Writ of Mandate/ Prohibition on August 31, 1977.

The Supreme Court of California, on September 28, 1977 denied petitioner Edward Emery's Petition for Hearing before that court.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was entered on August 31, 1977 (Appendix C, infra page C-1). A timely petition for hearing before the California Supreme Court was denied on September 28, 1977, (Appendix D, infra page D-1). The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. § 1257 (3) to wit:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

and Title 28 U.S.C. § 2101(c) to wit:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action,

suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

QUESTIONS PRESENTED

Question 1.

Is the search and seizure with a warrant unreasonable if?

(1) The warrant is insufficient on its face; right to move to quash;

(2) There was no probable cause for the issuance of the warrant; right to traverse;

(3) Affidavits upon which search warrant is based contains no competent evidence sufficient to support findings of magistrate.

Question 2.

Do intentional, false, material misstatements supporting an affidavit for

search warrant negate the entire warrant?

Question 3.

Should the evidence seized by the search warrant be suppressed if it was the product of an unreasonable search and seizure?

Question 4.

Should a Writ of Prohibition issue from denial of a motion under Penal Code § 995 where all essential requirements have been met; where neither reasonable nor probable cause has been established?

(1) Did respondent act in excess of its jurisdiction where the information to be set aside is in absence of strong suspicion of guilt of accused?

(2) Did respondent act in excess of its jurisdiction if commitment is in absence of evidence of occurrence of crime or connecting the defendant with a crime?

(3) Did respondent act in excess of its jurisdiction where commitment

is based on incompetent evidence or evidence illegally obtained?

(4) Did respondent act in excess of its jurisdiction if the prosecution has failed to show that defendant has committed the crime charged in order to establish sufficient cause to hold defendant to answer?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution - Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The California Constitution likewise provides against unreasonable searches:

The right of the people to be secure in their persons, houses, papers, and

effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and the things to be seized.

California Constitution, Ann., Art. I, Section 13 (Deering Supp. 1977).

The following statutory provisions of the California Penal Code are applicable and are set out verbatim in the appendix:

California Penal Code, Section 995
California Penal Code, Section 1525
California Penal Code, Section 1538.5
California Penal Code, Section 1539

STATEMENT OF THE CASE

This is a criminal action in which a newly formed crime task force, initially federally funded, obtained a search warrant that was not only insufficient on its face but one for which there was no probable cause for the issuance of the search warrant, which warrant authorized search for

but two weapons, and then, armed with that warrant, some six (6) to eight (8) members of this newly formed crime task force, went to the residence of petitioner, a man who had been a continuous resident for some years, a man with apparently no prior police problems, a man known for many years as a gun collector, with no information, implicitly or explicitly, that he was changing his residence, found the weapons the subject of the complained of search warrant and thereafter continued searching, even into a closed safe, taking possession of some 50+ weapons.

THE EVIDENCE

On May 10, 1976, and for some years prior, petitioner had been a resident of Eagle Mountain, California, in business in Eagle Mountain, California, a gun collector for many years, apparently had no prior police problems and had taken and was taking no steps, implicitly or explicitly, to change any of the above facts.

On or about March or April, 1976, the Coachella Valley Major Crimes Task Force was formed, with initial support from

federal funds.

Elwin Summers, a member of the Coachella Valley Major Crimes Task Force, on May 10, 1976, submitted an Affidavit for Search Warrant (Appendix F, infra page F-1) together with three attachments: Source of Information (Informant's Reliability) (Appendix H, infra Page H-1), Sources of Information (Informant-Official Source) (Appendix I, infra page I-1) and Affiant's Declaration (Appendix G, infra page G-1). Said documents were submitted by Elwin Summers with the knowledge and expectation that the Magistrate would read, review and rely upon said documents in determining whether the search warrant requested, for two weapons, a rifle and a pistol, search warrant number 39212 (Appendix E, infra page E-1), would be issued. The Magistrate did rely on these documents, affidavits and representations, and the court did, relying thereon, issue the requested search warrant.

Since the search warrant is based on the referenced three attachments, the sufficiency of said attachments must be examined.

1. Source of Information (Informant's Reliability)

This document was intended to support the requested search warrant regarding item number 1 thereof, "45-70 Cal. Springfield Rolling Block rifle, S/N #180470" (Count I of the Information). The information set forth therein was admittedly based upon that from an informant whose reliability was untested, but attempted to justify the issuance of the warrant regarding this item because: "...information received from this informant establishes the existence of an emergency or has been corroborated as to essential matters in that ...." (Emphasis added.) Thus, one might reasonably expect some facts reflecting "emergency" or "corroboration." This document is totally devoid of any facts showing, explicitly or by implication, either emergency or corroboration.

When Elwin Summers was questioned about the emergency and corroboration, he acknowledged there were none; that Petitioner was a gun collector, there was nothing odd about a gun collector collecting guns, that Petitioner had a business in Eagle Mountain and, in addition, worked

in Eagle Mountain and that he had neither information nor belief that Petitioner was leaving the area or moving.

Prior to the submission of the affidavits to the Magistrate, the law enforcement officer, Elwin Summers, was aware regarding the informant, Lupe Chavarria, that;

said informant had never been used before as an informant and had a criminal background of burglary, receiving stolen property and heroin use and sale and more recently, some 10 days before the complained of search warrant was sought, was aware that contraband was found at his residence and that he had traded stolen property for narcotics.

The only facts alleged with regard to the placement of the rifle were from the confidential informant.

When the law enforcement officer, Elwin Summers, was questioned as to why he did not relate to the Magistrate on May 10, 1976, (1) the lack of emergency, (2) the lack of corroboration and (3) the lack of reliability of the informant,

he merely indicated he reviewed all with the District Attorney.

If the factual misstatements were deleted, probable cause could not be established, only the following remaining of the facts detailed in Attachment No. 2 to the search warrant affidavit: "A record search indicated that a Springfield 45-70 Rolling Block rifle, S/N #180470 was stolen on 3-22-76 from a Tom Allchin at Ave. 52 and Van Buren, Coachella, California. C1-76-082-019."

The deliberate omission by Elwin Summers -- apparently condoned or authorized by the District Attorneys' office, assuming it was aware of the facts -- of material facts, resulted in an affidavit that was factually inaccurate; and if there had not been such omissions and all information had been factually accurate, the resulting document would not have established probable cause with regard to this item.

2. Source of Information (Informant-Official Source)

This document was intended to support the requested search warrant regarding item number 2 thereof ("22 Cal. Revolver, Blue steel 3" barrell, 7 shot with black plastic grips" -- Count II of the Information) and was to be used as evidence of information from an official source; yet, in this instance, the alleged official source, Deputy James Bowen, supplied no information himself but merely allegedly stated to Elwin Summers what ... Tonya Tollison, an untested informant with numerous admitted criminal acts, stated to him [Bowen] ... (Emphasis added.) None of the information in this document was based on the personal knowledge of James Bowen; instead, it was based on the alleged statements by Tonya Tollison to James Bowen, the supposed official source. It is therefore submitted that the informant was not James Bowen, but instead, Tonya Tollison, an unreliable, untested informant, herself under arrest at the time of the alleged statements, statements which were contradicted by the same Patricia Comer referred to in this document; not an "official source."

When Deputy James Bowen was questioned about the events that took place on April 30, 1976, the date of the alleged statements by Tonya Tollison and Patricia Comer, and ten days before issuance of the complained of search warrant, number 39212, he indicated that:

a. Some 10 days before the complained of search warrant was sought, he arrested Tonya Tollison for burglary, and when interviewed that same day she admitted three burglaries and trading stolen property to Lupe Chavarria, the confidential informant regarding item number 1, for narcotics; that Patricia Comer sold the 22 caliber revolver to Ned Emery; that she also admitted theft of two guns from her parent's residence; that in Tonya Tollison's suitcase he found a pill bottle containing tablets, "double scored," which appeared to be minibennies. Prior to the arrest, he knew Tonya was on drugs and had committed various burglaries. On the same day he also interviewed Patricia Comer, who denied any knowledge of burglaries and denied that she sold any gun to Petitioner, and stated that Tonya Tollison was lying

and was trying to implicate her because Tonya Tollison disliked her.

b. When questioned about the credibility of both girls due to the conflicts, he stated: (1) "I would weigh amything either one of them said to me with a lot of care" and (2) "... I tried ..." but there "... was no way I could prove or disprove which one was telling the truth and who wasn't."

Deputy James Bowen also testified that before May 10, 1976, the day the com plained of search warrant was requested, Elwin Summers was aware of all the foregoing.

The evidence is substantial and uncontradicted that before May 10, 1976, Elwin Summers had full knowledge of the (1) criminal background of Tonya Tollison, Patricia Comer and Lupe Chavarria; (2) inter-relationship of these three people; (3) denial by Comer of the allegations of Tollison as they related to Petitioner and the pistol; (4) denial by Comer of any theft and denial of any sale to Petitioner; (5) denial of Petitioner of any

wrongdoing; (6) fact that James Bowen did not recall knowing whether Pat Comer or Tonya Tollison was telling the truth; and (7) involvement of Tonya Tollison and Pat Comer and Lupe Chavarria in drugs.

When Elwin Summers was questioned about why he failed to inform the court of (1) the unreliability of Tonya Tollison, (2) the conflicts between Tonya Tollison and Patricia Comer and (3) the denial of Petitioner, in effect confirmed by the statements of Patricia Comer, he offered no satisfactory answer.

If the factual misstatements were deleted, probable cause could not be established; the document would be blank. If all material information were included, probable cause could not be established.

The deliberate omission by Elwin Summers of material facts -- resulted in an affidavit that was factually inaccurate; and if there had not been such omissions and all information had been factually accurate, the resulting document would not have established probable cause with regard to this item.

3. Affiant's Declaration

This document was intended as the declaration of Elwin Summers, and said declaration was based for the most part upon the other two attachments referred to in items 1 and 2 above.

If we delete from the declaration of Elwin Summers that information based on the other two attachments for the reasons set forth above, the following remains: "Information from Deputy Bowen, Riverside Sheriff's Office, Eagle Mtn.,; is that he has seen a safe inside Emery's residence and that Emery is a gun collector and keeps guns in said safe." Probable cause cannot be established by this.

What does appear quite clear is that Elwin Summers, in charge of this investigation by the newly formed Coachella Valley Major Crimes Task Force, was overzealous in his desire to make a "bust" and, as a result, intentionally deleted information, thereby resulting in factual misstatements. These deliberate omissions of material facts resulted in an affidavit that was factually inaccurate, and it became the People's burden "to show proper

justification." The People failed to meet this burden.

Thereafter, on May 11, 1976, officers James Bowen, Elwin Summers, Jim Kennedy and others (a total of six to eight officers) went to the residence of Petitioner with search warrant number 39212, allegedly seeking but the two weapons, neither of which was illegal to possess, from this long-time resident and businessman, who, from the data set forth in the attachment in support of said search warrant, was a gun collector and did allegedly buy the guns -- a man who, apparently, despite his standing in the community, was not questioned about the guns, the attachments in support of the warrant being totally silent in that regard.

No one testified that Petitioner was asked for the two guns, or either of them; yet both officers' James Bowen and Elwin Summers testified to Petitioner's cooperative attitude and the fact that he told them when they entered the residence where the rifle was and that: "If you wanted the rifle, all you had to do is ask." and may have told them as well where the pistol was.

The testimony of officer Summers and various other officers also establish that the rifle and the pistol, the only items the subject of the complained of search warrant, were in fact both found and located before the other items were found and located. However, after the said rifle and pistol were both found and located, the officers continued searching the residence and in the process opened and searched a large standup safe in which were located many weapons, including the sawed-off shot gun for which Petitioner is charged herein.

When the safe was opened the sawed-off shot gun was not in plain view ... it was hard to distinguish from the handguns to the shot gun because of the size ..., the sawed-off shot gun was found only after a search of the safe.

After the arrest, the Petitioner appeared at a Preliminary Hearing and a Motion under Penal Code § 1538.5 in Municipal Court and a renewed § 1538.5 Motion in Superior Court. At the Preliminary Hearing, the evidence presented did not establish the occurrence of the offenses charged or

reasonably connect Petitioner to any criminal offense.

(1) Count I of the Information: Receiving Stolen Property (a rifle)

No credible evidence was produced or offered in which Petitioner was shown to have known or reasonably suspected that the subject rifle was stolen. It was well known that Petitioner is a gun collector. Normally in a charge such as this, a significantly low price is paid for merchandise reflecting actual or constructive knowledge of the item's stolen nature. Here, however, Petitioner paid $100 for the rifle. No evidence was presented indicating that the offer to sell the rifle for $200 and the actual sale price of $100 should have or did place Petitioner on notice of the rifle's stolen character. Moreover, Petitioner, himself, was quoted by the prosecution's witness, Officer Elwin Summers, as having steadfastly denied any knowledge of the stolen character of the evidence seized. Petitioner's denial was affirmed by the prosecution's informant, Lupe Chavarria, the party who

sold the said rifle to Petitioner, who stated that: he told Petitioner the rifle was his and said nothing about its being "hot", "The only thing that I told him was that the gun was mine. I didn't tell him the gun was stolen. He didn't know the gun was stolen or anything like that."

In opposition to the testimony of Chavarria, the confidential informant, indicating Petitioner had no knowledge of the illegal nature of the rifle, was the testimony of Patricia Carol Comer Wameling (hereinafter Comer), who testified that Petitioner had knowledge of the illegel nature, yet this same Patricia Comer also testified that as to the rifle, she could not identify it; that it appeared to be just an old rifle; that Chavarria had a number of rifles in the trunk of his car so she did not know exactly which one he sold; that she was not paying much attention; that she could not see which rifle was taken to the house because it was wrapped up in a blanket; that she could not hear all words spoken; that she traded immunity from prosecution for testimony

against Petitioner.

Yet, this same Patricia Comer's testimony indicates that Petitioner had knowledge, which was disputed by the prosecution's confidential informant, Lupe Chavarria.

To base probable cause upon the disputed testimony of such a witness as Comer stretches the law beyond reason. The comments of witness Chavarria, with credibility never questioned by the People, supporting Petitioner's contention of lack of knowledge, are direct and firsthand. That being the case, it cannot be said that, as a matter of law and upon the foregoing facts, probable cause existed to hold appellant on Count I of the Information.

(2) Count II of the Information: Receiving Stolen Property (a revolver)

The revolver (or pistol) was purchased by Petitioner for $10 after an offer to sell it to him for $20. Here, however, the the supposed seller, witness Comer, testifive she told Petitioner the pistol was stolen.

Significantly, Comer, after having been fully advised of her rights and then having waived them, some 10 days prior, denied she sold Petitioner anything. Moreover, her credibility is in serious question: she has openly admitted having committed at least six or seven burglaries and to having been involved in narcotics. The law enforcement authorities acknowledged they would not believe anything she said without exercising great care.

During testimony, Comer was unable to describe the pistol allegedly sold to Petitioner with any degree of satisfaction.

It is a basic requirement that not only must the thief be identified but the stolen article as well. It would have been impossible for a reasonable person to conclude that there was, in fact, a crime committed, and by this Petitioner, based upon evidence presented at the preliminary hearing herein. The only testimony or other evidence presented indicating a guilty knowledge by Petitioner is that testimony of Comer alluded to above. When measured against the denial of Petitioner, here, against

Petitioner's good reputation in the community, and knowing the lack of credibility of Comer, her criminal and narcotic background, her inability to identify the pistol and the self-serving nature of her testimony, there was not probable cause to bind Petitioner over on Count II of the Information.

(3) Count III of the Information: Unlawful Possession (of a shotgun)

This item was not listed in the original search warrant herein, number 39212, and was not in "plain view."

The testimony of Officers James Bowen and Elwin Summers indicated that the sawed-off shot gun was found in the large closed safe, after the pistol and rifle were already found and located; that the safe had a lot of guns in it and those guns were removed before the shot gun was found, and that the sawed-off shot gun was found only after a search of the safe, the sawed-off shot gun not being in plain view.

If the only substantial evidence supporting the commitment was obtained in

violation of the Fourth Amendment to the United States Constitution, Petitioner is held to answer without reasonable or probable cause. People v. Scoma, 71 Cal.2d 332, 335, 78 Cal.Rptr. 491, 493, 455 P.2d 419 (1969). Such being the case, the evidence so obtained cannot be considered as establishing the offense of unlawful possession of a shotgun (Penal Code. § 12020). (Appendix A, infra, page A-14 to A-18)

THE RULING BELOW

The Superior Court of Riverside County, State of California, Indio Division in the case entitled People of the State of California v. Edward Robert Emery, docket number IND CR 5340, denied defendant's motions under California Penal Code, §§ 995 and 1538.5 respectively, heard on or about July 5 and 6, 1977.

On or about July 13, 1977, Edward Robert Emery sought review of the Superior Court decision denying defendant's motions hereinabove and filed with the Court of Appeal of the State of California for the Fourth Appellate District, Division Two, a Petition for Writ of Mandate/Prohibition and Request for Stay.

On August 31, 1977, the Court of Appeal of the State of California for the Fourth Appellate District, Division Two, denied Edward Robert Emery's Petition for Writ of Mandate/Prohibition and vacated the stay order issued by said court on July 14, 1977. (Appendix C, infra page C-1).

On or about September 12, 1977, Petitioner herein, Edward Robert Emery, filed with the California Supreme Court a Petition for Hearing and Temporary Stay. On September 28, 1977, the California Supreme Court denied hearing on said matter (Appendix D, infra page D-1).

REASONS FOR GRANTING THE WRIT

1.

The Search and Seizure With a Warrant Is Unreasonable if:

(1) The warrant is insufficient on its face; right to move to quash warrant

The Penal Code of California, § 1538.5 (a) (2) (Deering 1971), provides, inter alia, for the right of a defendant to move to quash a warrant: (Appendix A, infra pages A-1 and A-2).

In appropriate circumstances, the property seized by law enforcement must be restored to the dispossed:

> If it appears that the property taken is not the same as that described in the warrant, or that there is not probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.
>
> Penal Code, § 1539 (Deering 1971).

(2) There was no probable cause for the issuance of the warrant; right to traverse

By this time, it is well established in California that a defendant may look into the supporting affidavit to a warrant to inquire as to the presence of sufficient probable cause to believe the existence of the allegations used therein as the basis for the warrant's issuance. The leading case in this regard is Theodor v. Superior Court of Orange County, 8 Cal.3d 77, 100-101, 104 Cal.Rptr. 226, 243, 501 P.2d 234 (1972).

Associate Justice Gargano restated the rule in Theodor and summarized the

present law in the recent case of Morris v. Superior Court of Merced County, 57 Cal.App.3d 521, 525-28, 129 Cal.Rptr. 238, 241-42 (1976), in the following language:

> It now is settled that pursuant to a 1538.5 suppression motion a person charged with a crime founded upon evidence adduced through the execution of a search warrant may go behind the face of the supporting affidavit in an effort to prove that there was no probable cause for the issuance of the warrant. (Theodor v. v. Superior Court, [1972] 8 Cal.3d 77, 90-95, 104 Cal.Rptr. 226, 501 P.2d 234) Therefore, an accused may show that the affidavit contains factual misstatements or material factual omissions which could have had an adverse effect upon the normal inference-drawing process of the magistrate.

If the factual misstatements are not intentional and are the result of reasonable conduct, they are retained in the document and probable cause is tested by what appears upon the face of the affidavit; on the other hand, if the factual misstatements, though not intentional, are the result of negligent conduct, they must be excised and probable cause tested from the remaining information. (Theodor v. Superior Court, supra, 8 Cal.3d 77, 95-101, 104 Cal.Rptr. 226, 501 P.2d 234) Likewise, if material factual omissions are not intentional

and are reasonable under the circumstances, the omitted matters are disregarded and the existence of probable cause is tested by whatever appears upon the face of the affidavit; if the failure to include material information, though not intentional, is negligent, the omitted facts are added to the affidavit and probable cause is tested in light of the additional information. (People v. Barger [1974] 40 Cal.App.3d 662, 668-669, 115 Cal. Rptr. 298.)

Left unanswered is the fundamental question which arises when factual misstatements are intentional. (Theodor v. Superior Court, supra, 8 Cal.3d 77, 101, fn. 14, 104 Cal.Rptr. 226, 501 P.2d 234), or when material information is omitted deliberately (People v. Barger, supra, 40 Cal.App.3d 662, 669, 115 Cal.Rptr. 298).

. . .

> It is uncontestable that an officer who is seeking a search warrant has a duty to disclose to the magistrate all material facts relevant to the issue of probable cause. (People v. Barger, supra, 40 Cal.App.3d 662, 668, 115 Cal.Rptr. 298; People v. Legard [1970] 12 Cal.App.3d 1006, 1010.)

. . .

In short, the detective's deliberate omission of material facts resulted in an affidavit that was factually inaccurate. (Theodor v. Superior Court, supra, 8 Cal.3d 77, 96, fn. 11, 104 Cal.Rptr. 226, 501 P.2d 234, see also United States v. Averell, supra, 296 F.Supp. 1004, 1018; cf. People v. Webb [1973] 36 Cal.App.3d 460, 469-471, 111 Cal. Rptr. 524), and it became the People's burden "to show proper justification" (Theodor v. Superior Court, supra, 8 Cal.3d 77, 102, 104 Cal.Rptr. 226, 501 P.2d 234). The People failed to meet this burden, and we have no alternative but to order the supression of the evidence.

(Emphasis added.)

(3) Affidavits upon which search warrant is based contains no competent evidence sufficient to support finding of magistrate.

The United States Constitution, amend. IV, California Constitution, art. I, Section 13, and Penal Code, Section 1525, all indicate that

> a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

A search warrant is issued without probable cause, and therefore in violation of constitutional proscriptions, when the affidavit upon which it is based contains no competent evidence sufficient to support the finding of the magistrate. People v. Scoma, 71 Cal.2d 332, 78 Cal.Rptr. 491, 493, 455 P.2d 479 (1969); People v. Stout, 66 Cal.2d 184, 193, 57 Cal.Rptr. 152, 158, 424 P.2d 704 (1967).

The basic criteria for determining the constitutional sufficiency of an affidavit supporting a search warrant is set forth in in Aguilar v. State of Texas, 378 U.S. 108, 114 (1964):

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affidavit, the magistrate must be informed of some of the underlying circumstances from which the information concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or his information reliable.

Federal standards must be applied by the state courts in determining the

sufficiency of the affidavit upon which a search warrant can issue. People v. Tillman, 238 Cal.App.2d 134, 47 Cal. Rptr. 614, 616-17 (1965).

2.

Do Intentional, False, Material Misstatements Supporting an Affidavit for Search Warrant Negate the Entire Search Warrant?

It may be argued that the intentional, false, material misstatements supporting the search warrant herein should merely be excised from the search warrant; and the probable cause would be tested upon the remaining statements of the affidavit. People v. Cook, 64 Cal.App.3d 354, 134 Cal. Rptr. 484, 488 (1976), hearing granted, Crim. No. 19804, January 27, 1977 (Cal. Sup. Ct.). A careful analysis of the strong dissent of Justice Stephens, in Cook is enlightening. It is apparent from a reading of the case that the California Supreme Court may shortly overturn Cook as not following the intent of Theodor v. Superior Court, supra, 8 Cal.3d 77, 104 Cal.Rptr. 226, 501 P.2d 234 (1972).

Justice Stephens' dissent points out that Theodor only allowed excision from the affidavit[s] supporting a search warrant when the misstatement[s] was [were] reasonable errors made in good faith, or negligent mistakes. "...[E]xpressly left unresolved [was] the issue of whether its excision guidelines applied to the use of intentional misstatements." 64 Cal.App. 3d at 3___, 134 Cal.Rptr. at 492, citing Theodor v. Superior Court, supra, 8 Cal.3d at 101 n. 14, 104 Cal.Rptr. at 243 n. 14, 501 P.2d at 251 n. 14. Though Theodor did not settle the question of intentional misstatements, Justice Stephens weaves the reasoning of Theodor and Aguilar v. Texas, supra, 378 U.S. 108, 111, 84 S.ct. 1509, 1512, 12 L.Ed. 723, 727 (1964) together to show the reasoning which would lead to his conclusion that the entire search should thus be negated.

3.

The Evidence Seized by the Search Warrant Should be Suppressed if it Was the Product of an Unreasonable Search and Seizure.

Terry v. Ohio, supra, reaffirmed the settled principles that "a search which is unreasonable at its inception may violate the Fourth Amendment by virtue of its intollerable intensity and scope" and that the "scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."

(392 U.S. at PP. 17-19, 8 S.Ct. at p. 1878.)

People v. Collins, 1 Cal.3d 658, 83 Cal.Rptr. 179, 181 (1970)

4.

A Writ of Prohibition Should Issue From a Denial of a Motion Under Cal. Penal Code Section 995 Where All Essential Requirements Have Been Met Where Neither Reasonable Nor Probable Cause Has Been Established.

(1) Did respondent act in excess of its jurisdiction where the information to be be set aside is in absence of strong suspicion of guilt of accused?

Where the evidence at a preliminary examination does not establish such a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong

suspicion of the guilt of the accused, an information based on the evidence should be set aside. Williams v. Superior Court, 71 Cal.2d 1144, 80 Cal.Rptr. 747 (1969) People v. Pierce, 66 Cal.2d 53, 56 Cal. Rptr. 817 (1967); People v. Carcia, 265 Cal.App.2d 94, 71 Cal.Rptr. 102 (1968).

(2) Did respondent act in excess of its jurisdiction if commitment is in absence of evidence of occurrence of crime or connecting the defendant with a crime?

A defendant is committed without reasonable or probable cause where there is no evidence at preliminary examination tending to prove the occurrence of the offense charged. People v. Bernstein, 51 Cal.2d 655, 659, 335 P.2d 669 (1959); Levy v. Superior Court, 31 Cal.App.3d 427, 429-30, 107 Cal.Rptr. 384 (1973); Pittman v. Superior Court, 256 Cal.App.2d 795, 796-97, 64 Cal.Rptr. 473 (1967).

A defendant is committed without reasonable or probable cause where there is no evidence at the preliminary examination

to connect him with the commission of a crime. Rollins v. Superior Court, 223 Cal. App.2d 219, 223, 35 Cal.Rptr. 734, (1963); Polos v. Superior Court, 175 Cal.App.2d 210, 345 P.2d 981 (1959).

(3) Did Respondent act in excess of its jurisdiction where commitment is based on incompetent evidence or evidence illegally obtained?

A defendant has been held to answer without reasonable or probable cause if his commitment is based upon incompetent evidence. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958); Badillo v. Superior Court, 46 Cal.2d 269, 271, 294 P.2d 23 (1956); Rogers v. Superior Court, 46 Cal.2d 3, 291 P.2d 929 (1955)

The case of Beckers v. Superior Court, 9 Cal.App.3d 953, 88 Cal.Rptr. 602 (1970), is based upon facts similar to that before this court. In Beckers, a writ of prohibition issued to restrain prosecution of

the defendant for possession of drugs following denial of a motion to dismiss the information where the prosecution failed to produce warrants at the preliminary hearing to justify entry of the dwelling house and the resulting search. Associate Justice Coughlin wrote that:

> Where the only evidence in support of an information is inadmissible evidence, on motion under Penal Code section 995 the information must be set aside. (Rogers v. Superior Court, 46 Cal.2d 3, 7, 291 P.2d 929; People v. Bartlett, supra, 199 Cal.App.2d 173, 179, 18 Cal.Rptr. 480.)

Evidence of a search and arrest of a person in a dwelling, following an unlawful entry therein by the police, even though the search was upon consent of the person, is inadmissible under the principles stated and applied in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 417, 9 L.Ed.2d 441; People v. Superior Court, 71 C.A. 281, 286, 78 Cal.Rptr. 210, 455 P. 2d 146; People v. Sesslin, 68 Cal. 2d 418, 426, 67 Cal.Rptr. 409, 439 P.2d 321; People v. Henry, 65 Cal.2d 842, 846, 56 Cal.Rptr. 485, 423 P.2d 557

9 Cal.App.3d at 958, 88 Cal.Rptr. at 604.

A defendant is also committed without reasonable or probable cause where his com commitment is based upon evidence obtained by means of an illegal search of seizure. People v. Myers, 6 Cal.3d 811, 819, 100 Cal.Rptr. 612, 494 P.2d 684 (1972); People v. Scoma, 71 Cal.2d 332, 78 Cal. Rptr. 491, 455 P.2d 419 (1969); Priestly v. Superior Court, supra, 50 Cal.2d at 816, 330 P.2d at ___ ; Badillo v. Superior Court, supra, 46 Cal.2d at 271, 294 P.2d at ___ ; Carpio v. Superior Court, 19 Cal. App.3d 790, 792, 97 Cal.Rptr. 186 (1971).

In Scoma, the defendant challenged the sufficiency of the search warrant by motion to set aside (Penal Code § 995), which was granted by the trial court and affirmed by the Court of Appeal. Justice Sullivan wrote:

> A defendant is held to answer without reasonable or probable cause within the meaning of Section 995 of the Penal Code when the only substantial evidence supporting his commitment has been obtained in violation of the Fourth Amendment. (See Badillo v. Superior Court [1956] 46 Cal.2d 269, 271, 294 P.2d 23; Rogers v. Superior Court [1955] 46 Cal.2d 3, 7, 291 P.2d 929; cf.

> Greenberg v. Superior Court [1942] 19 Cal.2d 319, 321, 121 P.2d 713)
>
> 71 Cal.2d at 335, 78 Cal.Rptr. at 493.
>
> Section 1538.5 of the Penal Code, which deals in general with motions to suppress as evidence property obtained in violation of the Fourth Amendment, provides in subdivision (n) that "Nothing in this section shall be construed as altering *** (v) the procedure and law relating to a motion made pursuant to § 995 or the procedures which may be iniated after the granting or denial of such a motion." It therefore appears that § 995 remains a proper remedy when the evidence alleged to have been obtained through illegal means is the only substantial evidence supporting the commitment.
>
> 71 Cal.2d 335 n. 2, 78 Cal.Rptr. 493 n. 2

For the foregoing reasons this petition should be granted.

Respectfully submitted

LOUIS M. NIVEN

A Professional Law Corporation

By LOUIS M. NIVEN

Attorney for Petitioner

APPENDIX A

STATUTES INVOLVED

California Penal Code, Ann. Section 995 (Deering 1971) states:

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.
2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That the defendant had been committed without reasonable or probable cause.

California Penal Code, Ann. Section 1538.5 (Deering 1971) states:

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a

warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or

evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a

felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the speical hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing,

and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the speical hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to

show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted

and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(1) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the

termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30

days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant

providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in

superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and which to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

California Penal Code, Ann. Section 1539 (Deering 1971) states:

(a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person

who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe his shorthand notes pursuant to this section if any party to a special hearing in the superior court files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious, defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the county clerk shall deliver the original of such transcript so filed with him to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than

a fictitious defendant) upon demand by him without cost to him.

California Penal Code, Ann. Section 1525 (Deering 1971) states:

A search-warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

California Penal Code, Ann. Section 12020 (Deering 1977 Supplement) states:

(a) Any person in this state who manufactures or causes to be manufactured, imports into this state, keeps for sale, or offers or exposes for sale or who gives, lends, or possesses any cane gun or wallet gun, any firearm which is not immediately recognizable as a firearm, any ammunition which contains or consists of any flechette dart or any instrument or weapon of the kind you may know as blackjack, slung shot, billy, nunchaku, sand club, sand bag, sawed-off shotgun, or metal knuckles or who carries concealed upon his person any explosive systems other than fixed ammunition or who carries concealed upon his

person a dirk or dagger, is guilty of a felony, and upon conviction shall be punishable by imprisonment in the county jail not to exceed one year or in a state prison.

(b) Subdivision (a) shall not apply to any of the following:

(1) The manufacture, possession, transportation or use, with blank cartridges, of sawed-off guns solely as probes for motion picture film or television program production when such is authorized by the Department of Justice pursuant to Article 6 (commencing with Section 12095) of this chapter and is not in violation of federal law.

(2) The possession of a nunchacku on the premises of a school which holds a regulatory or business license and teaching the art of self-defense.

(3) The manufacture of a nunchacku for sale to, or the sale of a nunchacku to, a school which holds a regulatory or business license and teaches the art of self-defense.

(4) Any antique firearm. For purposes of this paragraph the term "antique firearm" means any firearm not designed

or redesigned for using rimfire or conventional centerfire ignition with fixed ammunition, and manufactured in or before 1898, including any matchlock, flintlock, percussion cap, or similar type of ignition system.

(c) Any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale or offers or exposes for sale, or who gives, lends, or possesses any instrument without handles consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond, or other geomatric shape for use as a weapon for throwing is quilty of a felony and upon conviction shall be punishable by imprisonment in the county jail not exceeding one year or in a state prison.

(d) (1) As used in this section "sawed-off shotgun" means any firearm (including any revolver) manufactured, designed, or converted to fire shotgun ammunition having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches

in length, or any weapon made from a rifle or shotgun (whether by manufacture, alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches

(2) As used in this section "a nunchacku" means an instrument consisting of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self-defense such as karate.

(3) As used in this section "a wallet gun" means any firearm mounted or enclosed in a case, resembling a wallet, designed to be capable of being carried in a pocket or purse, if such firearm may be fired while mounted or enclosed in such case.

(4) As used in this section "a cane gun" means any firearm mounted or enclosed in a stick, staff, rod, crutch, or similar device, designed to be capable of being used as an aid in walking, if such firearm may be fired while mounted or enclosed therein.

(5) As used in this section "a flechette dart" means a dart, capable of

being fired from a firearm, which measures approximately one inch in length with tail fins which take up five-sixteenths inch of the body.

APPENDIX B

CONSTITUTIONAL PROVISIONS

United States Constitution,
Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Constitution, Ann. Article I Section 13 (Deering 1977 Supplement) states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

JUDGMENT OF COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

COURT OF APPEAL
FOURTH DIST. FILED
AUG 31 1977
ERVIN J. TUSZYNSKI,
Clerk

_____
Deputy Clerk

EDWARD ROBERT EMERY
Petitioner,

vs.

SUPERIOR COURT,
RIVERSIDE COUNTY
Respondent

RECEIVED
SEP 1 1977

4 Civ. NO. 19153

COUNTY NO. I-CR-5340

PEOPLE,
Real Party in Interest

BY THE COURT:

The stay order issued by this court on July 14, 1977 is hereby vacated; and

The petition for writ of mandate/ prohibition is DENIED.

Morris, J. Acting P.J.

Copies to:
County Clerk, Courthouse, Riverside
Attorney General, San Diego
District Attorney, Courthouse, Riverside
Louis M. Niven, 1681 West Broadway, Ste. 102, Anaheim, 92802

DECREE OF THE CALIFORNIA
SUPREME COURT

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

SEP 28 1977

I have this day filed Order _____

HEARING DENIED

RECEIVED

SEP 30 1977

In re: 4 Civ. No. 19153
Emery

vs.

Superior Court, Riverside

Respectfully,

G. E. BISHEL
Clerk

D-1

APPENDIX E

SEARCH WARRANT

IN THE MUNICIPAL COURT OF DESERT JUDICIAL DISTRICT COUNTY OF REIVERSIDE, STATE OF CALIFORNIA

SEARCH WARRANT

S.C. Warrant No. _____

M.C. Warrant No. 39212

DESERT MUNICIPAL
Judicial District

To any Sheriff, Police Officer, Constable, Marshal or Peace Officer in the County of Riverside:

A sworn statement having been made to me by Elwin Summers (Name) Police Officer (Title) and it appearing that there is probable cause to believe that at the place (and on the person and in the vehicle) described as follows: A one story stucco house with detached one car garage, white in color with green trim, located at the Southwest corner of Oleander Drive and Yucca Drive, Eagle Mtn, with an address of 717 Oleander Drive, Eagle Mtn. CA. in the County of Riverside, there is now being concealed therein certain property, namely:

#1) 45-70 Cal. Springfield Rolling Block rifle, S/N #180470

#2) 22 Cal. Revolver, Blue steel 3" barrel, 7 shot with black plastic grips.

which is __X__ stolen property

_____ property used to commit a felony

_____ property in possession of (or being concealed by) another with intent to commit a public offense

_____ property tending to show

a felony was committed and I am satisfied that there is probable cause to believe that the property so described is at the above described place (and on the above described person, and in the above described vehicle) and that the foregoing grounds for application for issuance of the search warrant exist.

THEREFORE, you are hereby commanded to serve this warrant; search the place (and the person, and the vehicle) named for the property specified; and to then seize it if found; leaving a receipt for any property seized at the place of search; and to prepare a written inventory of the

property seized; and to return this warrant together with the above written inventory; and to bring the property before me within TEN DAYS of this date, as required by law. Proof as aforesaid having been made you may do such of the following as bear my initials, you

_____ may serve this warrant at any time of day or night as the case may be, according to Penal Code Section 1533;

_____ need not comply with Penal Code Section 1531.

Time of Issuance 2:05 A.M.- P.M.

Time of Execution _____ A.M.- P.m.

DATED: this 10 day of May, 1976.

/s/ Claude B. Brown
Magistrate

Judge of the Municipal
Superior, Municipal

Court Desert
Judicial District

APPENDIX F

AFFIDAVIT FOR SEARCH WARRANT

IN THE MUNICIPAL COURT OF DESERT JUDICIAL DISTRICT COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

AFFIDAVIT FOR SEARCH WARRANT

F I L E D
MUNICIPAL COURT
DESERT JUDICIAL DISTRICT
INDIO, CALIFORNIA
MAY 10 1976
M. McLAUGHLIN, Clerk

By /s/ T. Hunts
Deputy

S.C. Warrant No. _____

M.C. Warrant No. 39212

DESERT MUNICIPAL
Judicial District

Being duly sworn, I the UNDERSIGNED,

Elwin Summers (Name) Police Officer (Title),

say that at the place (and on the person and in the vehicle) described as follows: A one story stucco house with detached one car garage, white in color with green trim, located at the Southwest corner of Oleander Drive and Yucca Drive, Eagle Mtn., with an address of 717 Oleander Drive, Eagle Mts., CA. in the County of Riverside,

there is now being concealed therein certain property, namely:

#1) 45-70 Cal. Springfield Rolling Block rifle, S/N #180470

#2) 22 Cal. Revolver, Blue steel 3" barrel, 7 shot with black plastic grips.

which is __X__ stolen property

_____ property used to commit a felony

_____ property in possession of (or being concealed by) another with intent to commit a public offense

_____ property tending to show a felony was committed and the facts establishing the foregoing grounds for issuance of a search warrant are as follow:

A. Affiant's Declaration (See Attachment (s) __1__)

B. Source of Information (See Attachment (s) 2 & 3)

C. Basis of Informant's personal knowledge (See Attachment(s) _____

D. Nighttime service requested (See Attachment(s) _____

E. Request that compliance with Penal Code Section 1531 be excused (See

Attachment _____)

F. Other Attachemnt(s) _____.

All attachments are incorporated herewith as though fully set out herein.

/s/ EL Summers
Affiant

Subscribed and sworn to before me this 10 day of May, 1976.

/s/ Claude B. Brown
Magistrate

Judge of the Municipal Court
Superior, Municipal

Desert
Judicial District

WHEREFORE, it is prayed that a Search Warrant Issue.

BYRON C. MORTON
District Attorney

By /s/ W. Clark
Deputy District Attorney

AFFIANT'S DECLARATION-ATTACHMENT 1

IN THE MUNICIPAL COURT OF DESERT JUDICIAL DISTRICT COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

Attachment No. 1

AFFIANT'S DECLARATION

Affiant's Name Elwin Summers

Occupation Police Officer No.Of Years 4½

Assignement Detective No.Of Years 2

Department Employed by Coachella Police Department

Date Information Received Wed. 5-5 1976 (Day-Date-Month)

Approx. time 1500 ~~X~~p.m.

Your affiant received information as follows: On 5-5-76, received information from Confidential Informant that a stolen 45-70 rifle was sold at the Emery house in Eagle Mtn., to a NED EMERY for $100.00 and placed in a safe. Said rifle had been stolen approximately one month prior, from a house on Van Buren and Ave. 52. Investigation revealed that ED EMERY lives at 717 Oleander St., Eagle Mtn., CA.

Information from Dep. Bowen, Riverside Sheriff's Office, Eagle Mtn.; is that he has seen a safe inside EMERY's residence

and that EMERY is a gun collector and keeps guns in said safe.

Bowen further related, that on approximately 4-30-76, a female known as TONYA TOLLISON related to him that she was present when a PATRICIA COMER sold a 22 cal. revolver to ED EMERY at his home, for $10.00, Said gun being stolen from an ELGIE COMER of 936 Pinto, Eagle Mtn., CA. Report #A1-76-104-013.

SOURCE OF INFORMATION-ATTACHMENT 2

IN THE MUNICIPAL COURT OF DESERT JUDICIAL DISTRICT COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

Attachment No. 2

SOURCE OF INFORMATION
(Informant's Reliability)

Affiant's Name Elwin Summers

Occupation Police Officer No.of Years 4½

Assignment Detective-BTF No.of Years 2

Department Employed by Coachella Police Deparment

Date Information Received 5-5 1976
(Day-Date-Month)

Approx. time 1500 ~~xxx~~.- p.m.

Your affiant received information from an informant whose name is:

Confidential

_____Unknown

_X__Confidential for the following reason(s):

_____Disclosure of his identity would endanger his safety.

_X__Disclosure of his identity would impair his future usefulness to law enforce-

ment in uncovering illegal activity.

The informant's reliability is untested, however, information received from this informant establishes the existence of an emergency or has been corroborated as to essential matters in that: On 5-5-76 at 1500, the informant advised that he was present when a 44-70 Breech Loader Rifle which was stolen from a house at Van Buren & ave. 52, Coachella, approximately one month prior, was sold to a WMA, known to Confidential Informant as NED EMERY. The sale taking place at EMERY's home in Eagle Mountain, CA. The Confidential Informant observed EMERY place the rifle inside a large safe inside the house. Said safe contained numerous guns.

A record search indicated that a Springfield 45-70 Rolling Block rifle, S/N #180470 was stolen on 3-22-76 from a TOM ALLCHIN at Ave. 52 and Van Buren, Coachella, California. C1-76-082-019.

SOURCES OF INFORMATION-ATTACHMENT 3

IN THE MUNICIPAL COURT OF DESERT JUDICIAL DISTRICT COUNTY OF RIVERSIDE COUNTY OF CALIFORNIA

Attachment No. 3

SOURCES OF INFORMATION
(Informant - Official Source)

Affiant's Name Elwin Summers
Occupation Police Officer No.of Years 4½
Assignment Detective-BTF No.of Years 2
Department Employed by City of Coachella
Date Information received 5-10
(Day-Date-Month)
1976 Approx. time 10 a.m. - ~~p~~m.

Your affiant received information from (names of officers or official records)
Deputy Bowen Blythe Sheriff's Office - Eagle Mountain Sub Station

The information is reliable in that it comes from an official source, to wit: Deputy Bowen stated that TONYA TOLLISON stated to him that she, TOLLISON, was present when PATRICIAL COMER had sold a 22 cal. revolver, 7 shot Blue Steel, 3 inch barrel with black plastic grips to NED EMERY for $10.00.

TOLLISON stated, the gun was stolen from ELGIE COMER on 4-13-76, RSO case #A1-76-107-013. TOLLISON stated she was with PATRICIA COMER on 4-13-76 when COMER went to the EMERY residence with the gun and sold it for ten dollars. TOLLISON stated she saw COMER walk up to the front door of the EMERY residence and give EMERY the gun and COMER returned with $10.00.

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